Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

MICHAEL E. HICKS,

Petitioner,

v.

RONALD O. HARRISON,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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March 15, 2002

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QUESTION PRESENTED

Is a former state National Guard member's 42 U.S.C. § 1983 claim that his termination violated the First Amendment and federal statutory rights nonjusticiable, even in an official capacity suit for equitable relief, unless the claim is a facial challenge to military regulations?

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OPINION AND ORDER

The appellate opinion and district court order--issued after decision of an indistinguishable case, *Speigner v. Alexander*, 248 F.3d 1292 (11th Cir. 2001)--are unreported.

JURISDICTION

The judgment sought to be reviewed was entered December 18, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. § 7102 (excerpt)

Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right . . . to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.

42 U.S.C. §1983 (excerpt)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Hicks, a former member of the Florida Air Guard and former federal excepted service technician employed by the Air Guard under 32 U.S.C. § 709, sued the Florida Adjutant General, in official capacity, for equitable relief under 42 U.S.C. § 1983. Hicks alleged that the Air Guard terminated his military membership in retaliation for his exercise, during civilian technician employment, of (1) his right under 5 U.S.C. § 7102 to assist and to act for a labor organization; and (2) his First Amendment rights to (a) associate with fellow civilian employees in a union, (b) petition for redress, and (c) speak in furtherance of his and fellow employees' rights in a non-disruptive manner expressly authorized by federal law. The district court had federal question jurisdiction under 28 U.S.C. § 1331.

Following the decision in *Speigner v. Alexander*, 248 F.3d 1292 (11th Cir. 2001), the courts below dismissed Hicks's complaint as nonjusticiable. In *Speigner* the court held that only "cases challenging military regulations on their faces, rather than their application to discrete personnel decisions," are justiciable. 248 F.3d at 1297.

ARGUMENT

I

The decision below conflicts with those of other circuits

As the *Speigner* court acknowledged, 248 F.3d at 1297, the decision below conflicts with *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000)("intramilitary suits alleging constitutional violations but not seeking damages are justiciable"); and *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986)(discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed). The decision below also conflicts with *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998)(Guard member may obtain injunctive relief from New York State military's violation of its own regulation);[1] and *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989)(release of Reserve officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated).

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[1] The *Speigner* opinion, 248 F.3d at 1297, citing *Jones*, erroneously stated that the Second Circuit "follows the same approach" as the Fifth Circuit regarding justiciability of claims incident to military service. In contrast with the Fifth Circuit's barring of all equitable claims in *Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986), the Second Circuit in *Jones* upheld the justiciability of a claim for equitable relief. In *Dibble v. Fenimore*, 84 F. Supp. 2d 315 (N.D. N.Y. 2000) *interlocutory appeal pending*, No. 00-6243 (2d Cir. argued Feb. 14, 2001), the district court followed *Jones* and held claims for equitable relief, identical to those raised here, to be justiciable.

The question presented involves interests of exceptional importance--military need and the enforcement of constitutional rights. The Court should resolve the conflict among the circuit courts over this important question.

II

The decision below conflicts with the reasoning of this Court's opinions

The decision below is inconsistent with the reasoning of *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987). In holding servicemembers' individual capacity suits for damages to be nonjusticiable, both decisions distinguished official capacity suits for equitable relief. *Chappell*, 462 U.S. at 303, 304 (military correction board decision denying military promotion subject to judicial review; Court has "never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); *Stanley*, 483 U.S. at 683 ("redress designed to halt or prevent the constitutional violation" distinguishable from "award of money damages").

Contrary to the opinions in *Chappell* and *Stanley*, the court below and other appellate courts[2] have held that official capacity suits for injunctive relief are not distinguishable, for purposes of justiciability, from individual capacity suits for damages. On the other hand, the First, Second, and Third Circuits have recognized the distinction. *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d

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[2] For example, *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989).

45 (2d Cir. 1998); *Jorden v. National Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986).

In *Speigner*, the Eleventh Circuit asserted that "redress designed to halt or prevent [a] constitutional violation," *Stanley*, 483 U.S. at 683, is available only in "cases challenging military regulations on their faces." 248 F.3d at 1297. The court's sole basis for this assertion, however, was that cases affording equitable relief cited in *Stanley* had involved facial challenges. *Id.* The Eleventh Circuit identified no reasoning in the *Stanley* opinion to support a "facial challenges only" conclusion. There is none. The *Speigner* opinion also overlooked that military correction board cases approved by the *Chappell* opinion, 462 U.S. at 303, typically involve "discrete personnel decisions," 248 F.3d at 1297, not facial challenges. *See, e.g., Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

The Court should grant review and reject the lower court's interpretation of the *Stanley* opinion. For reasons developed further below, the Court should hold that servicemembers' official capacity suits for equitable relief are not limited to facial challenges to military regulations, and that Hicks's claim is justiciable.

III

The decision below and the "facial challenges only" rule have no basis in justiciability principles

Courts properly have recognized four grounds upon which a challenge to military action can be deemed to be nonjusticiable. None of these grounds applies here, and none is related to whether the challenge attacks a military

regulation on its face or concerns an individual personnel decision.

Intra-Military Immunity

Intra-military immunity applies to damage claims by military members against other military members sued in their individual capacities. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)(intra-military immunity precludes "exposing officers to personal liability at the hands of those they are charged to command").[3] In *Chappell* the Court expressly recognized that suits for equitable relief by military members

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[3] Intra-military immunity results in servicemembers being unable to sue the federal government for damages for torts committed by other servicemembers, *Feres v. United States*, 340 U.S. 135 (1950), but this is not because the immunity doctrine, itself, extends to the federal government or to official capacity defendants. Rather, it is because the federal government (including any federal official capacity defendant) has sovereign immunity from tort damages suits to the extent that immunity is not waived by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq*. The FTCA makes the United States liable only where the federal tortfeasor would be personally liable. Since intra-military immunity precludes personal liability, the United States cannot be held liable in damages for intra-military torts. Intra-military immunity also results in state servicemembers being unable to sue state governments or state official capacity defendants for damages for federal violations; but, again, this is not because the immunity doctrine, itself, extends to them. States and state official capacity defendants cannot be held liable for damages for federal law violations because they have Eleventh Amendment immunity and are not "persons" liable for damages under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of Police*, 491 U.S. 58 (1989).

against military officials, sued in their official capacities--such as cases against military service heads challenging separation from the military or denial of military promotion--are not precluded. 462 U.S. at 303, 304.[4] In *United States v. Stanley*, 483 U.S. 669 (1987), the Court followed *Chappell*. The Court held intra-military, individual capacity damages actions barred, but also echoed *Chappell*'s distinction between "redress designed to halt or prevent the constitutional violation" from "award of money damages." 483 U.S. at 683.

In distinguishing official capacity equitable suits from individual capacity damages actions, the Court in neither *Chappell* nor *Stanley* expressly addressed individual capacity equitable suits. Hicks's suit, however, does not raise this issue, since, as an official capacity suit, it does not raise intra-military immunity at all.[5] Similarly, the Eleventh Circuit's distinction between official capacity suits involving individual decisions, and those involving facial challenges, has no basis in intra-military immunity--again because official capacity suits do not implicate this doctrine.

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[4] Contrary to the Eleventh Circuit's view, the *Chappell* holding is not based on deference "to the military establishment." *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001). Rather, it is based on the need to protect military personnel from "personal liability." *Chappell*, 462 U.S. at 304. This protection is necessary because "the need for unhesitating and decisive action . . . would be undermined by . . . exposing officers to personal liability." *Id.* This point is inapplicable to official capacity suits.

[5] See n. 3, *supra*.

Issues Requiring Military Expertise

A second ground on which a challenge to a military decision may be held nonjusticiable is lack of judicial competence to decide the specific question presented, because the question requires military expertise. This principle can apply in suits by civilians as well as military members. The decision in *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969), illustrates the point. There, the court held that whether reserve fleet vessels were "available" to transport military cargo, within the meaning of a statute requiring that available domestic vessels be used before foreign vessels, was nonjusticiable because the issue was one of a "narrow band of matters" involving "decisions relating to the conduct of national defense" in which "the national interest contemplates and requires flexibility in management of defense resources" and "the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility." 420 F.2d at 131, 129. *See also United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968)("while the regulations wisely give . . . specific content to [the hardship exemption from military service], a good deal is necessarily left to the judgment of the commanding officer"; "administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide").

The *Curran* principle does not apply to Hicks's suit. Hicks does not claim that his separation was based on unsound military judgment. Rather, he claims that his separation was not based on military judgment at all--that he was separated in retaliation for exercise of First Amendment and federal statutory rights. Adjudication of these claims requires no military expertise. It does not involve review of

the wisdom of military opinions. The Eleventh Circuit's distinction between official capacity suits involving individual decisions, and those involving facial challenges, also has no basis in the *Curran* principle. The *Curran* principle could apply, or not apply, in either type of case, since its applicability depends on whether the specific issues raised require military expertise.

On this point, the *Speigner* court, 248 F.3d at 1296, erroneously relied on the remark in *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989), that "[t]he judiciary does not acquire competence in this area merely because the remedy sought is an injunction rather than damages." Contrary to the *Watson* court's assumption, intra-military immunity from damages is not based on lack of judicial competence to adjudicate all constitutional or federal statutory claims that arise incident to military service. Rather, intra-military immunity from damages is based on the need to protect service members from personal liability. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

As noted, the principle which holds claims nonjusticiable due to lack of judicial competence applies only to a "narrow band of matters" that require military expertise, *Curran*, 420 F.2d at 131; *Schonbrun*, 403 F.2d at 374-375, not to all service-related claims. Courts properly "defer to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions," *Speigner*, 248 F.3d at 1298, *quoting Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993), when they decline to decide specific issues that require military expertise.

Delay of Availability of Military Assets

A third ground on which a challenge to a military decision may be held nonjusticiable is where adjudication would delay

availability of military assets. *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968)("delay in the call-up of a reservist, even during the period necessary for judicial consideration of his claim to discretionary exemption, inevitably means . . . a gap in the unit").[6] The *Schonbrun* principle does not apply to suits, like Hicks's, which challenge military separations rather than call-up orders. Hicks's claims, if successful, would not deprive the military of assets, and adjudication of his claim therefore would not delay availability of military assets. The United States Court of Federal Claims routinely reviews military separation cases, and has authority to order reinstatement. *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

Contrary to the *Speigner* court's opinion, 248 F.3d at 1296, official capacity suits for military reinstatement do not "tamper with the established relationship between enlisted military personnel and their superior officers," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), because these suits do not subject military officers to personal liability. *Chappell*, 462 U.S. at 304. On this point, the *Speigner* court erroneously relied on *Knutson v. Wisconsin Air National*

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[6] Although a "gap in the unit" might be avoided by "call of another reservist who otherwise might not have been reached," *id.*, the gap would not be avoided if that other reservist also challenged the call-up decision. Allowance of Schonbrun's claim would allow class action challenges to call-up decisions, making gaps in the units unavoidable. In this setting, adoption of the Eleventh Circuit's "facial challenges only" rule, instead of the *Schonbrun* principle, would have a perverse effect, since facial challenges to military regulations affect large numbers of servicemembers, threatening greater deprivation of military resources than a challenge applicable only to one plaintiff.

Guard, 995 F.2d 765 (7th Cir. 1993). 248 F.3d at 1296. Nothing supports the *Knutson* notion that, since military reinstatement claims can require years to litigate, military separation in violation of the Constitution should be tolerated. The idea that the military cannot "staff properly," maintain "operational readiness," or properly conduct "training programs" while it "await[s]" the outcome of reinstatement litigation, *Knutson*, 995 F.2d at 771, is absurd. The mere filing of reinstatement litigation does not require the military to change its staffing, operations, or training. And even if the possibility of future reinstatement of an unconstitutionally-separated service member could be deemed to "significantly hamper" current staffing and mission accomplishment, *id.*, this possibility would not be a rational reason to allow facial challenges to military regulations, while disallowing challenges to individual personnel decisions. Simultaneous reinstatement of tens of thousands of members incident to judicial invalidation of an unconstitutional military regulation would cause far greater change in military staffing and operations than reinstatement of a single individual.

Since reinstatement is an available remedy in correction board cases, there is no reason to withhold this remedy in other official capacity military suits. The point has particular applicability to reinstatement suits by former National Guard members like Hicks, since separation from the Guard simultaneously severs federal as well as state military membership. *See Dibble v. Fenimore*, 84 F. Supp. 2d 315 (N.D. N.Y. 2000) (refusing to dismiss claim for reinstatement in state National Guard and granting summary judgment and remanding for reconsideration correction board's denial of federal military reinstatement, where denial of state and federal reenlistment alleged to be in retaliation for exercise of First Amendment and federal statutory and regulatory rights), *interlocutory appeal pending*, No. 00-6243 (2d Cir. argued Feb. 14, 2001). Given the undisputed availability of judicial

review of federal military separation, it makes no sense to deny review of simultaneous state military separation resulting from the same decision, made for the same reasons.[7]

Absence of Cognizable Legal Standard

A fourth ground on which a challenge to a federal military decision may be held nonjusticiable arises under the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, which apply to federal agencies generally, including the military. 5 U.S.C. § 551. Claims which challenge discretionary decisions, and which are not founded on either the Constitution or a statute or regulation embracing a cognizable legal standard, are unreviewable because they concern matters "committed to agency discretion" under 5 U.S.C. § 701(a)(2). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 409 (1971) (agency decision is "committed to agency discretion" where there is "no law to apply").[8]

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[7] Hicks's challenge to his federal military separation is pending before the correction board.

[8] The *Curran* court invoked this principle. 420 F.2d at 128. *Curran*, however, was decided before the Supreme Court's decision in *Citizens to Preserve Overton Park*. Under the latter decision, a statute requiring use of an "available" resource likely states a cognizable legal standard. 401 U.S. at 409. The point in *Curran* that remains valid after *Citizens to Preserve Overton Park* is that claims under an otherwise cognizable legal standard are nonjusticiable if interpretation or application of the standard requires military expertise beyond judicial competence.

Hicks's claims do not concern matters that would be deemed committed to agency discretion under the APA if his suit concerned federal (rather than state) military separation, and were brought against the federal Secretary of the Air Force (rather than the state Adjutant General). Hicks's claims are based on the First Amendment and a federal statute that embraces cognizable legal standards affording federal employees rights to serve as union representatives. These claims are justiciable. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998)(holding justiciable Guard member's claim for injunctive relief from New York State military's violation of its own regulation); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989)(release of Reserve officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (denial of military promotion reviewable for statutory violations); *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986) (discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1041 n. 11, 1044 (3d Cir. 1981) (absence of right to reenlist does not preclude judicial review of enlistment denial where statutory standard was violated).

Whether a constitutional or statutory claim is based on a cognizable legal standard, moreover, does not depend on whether the claim challenges a military regulation on its face or challenges an individual decision. The same constitutional or statutory standard could be invoked in either type of case.

None of the four bases of the nonjusticiability doctrine applies to Hicks's claims. And none of the differences between facial challenges to regulations and challenges to actions taken for undisclosed but unconstitutional reasons

have any bearing on justiciability. The Eleventh Circuit's "facial challenges only" rule is an arbitrary minimization of military suits, not a reasoned application of justiciability principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2002

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13887
Non-Argument Calendar

D.C. Docket No. 99-00683-CV-J-25

MICHAEL E. HICKS,

Plaintiff-Appellant,

versus

RONALD O. HARRISON, Major General,
Florida Army National Guard,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(December 18, 2001)

Before BLACK, MARCUS and COX, Circuit Judges.

PER CURIAM:

Michael E. Hicks appeals the district court's dismissal of his 42 U.S.C. § 1983 claim seeking declaratory and injunctive relief against the Adjutant General of the Florida National Guard in his official capacity. Hicks alleges that the Florida National Guard violated his constitutional and statutory rights by declining to retain him as a Florida National Guard member. The district court, applying our decision in *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001), concluded that Hicks's alleged injury was incident to military service and therefore nonjusticiable. The district court correctly applied the law of this circuit and properly dismissed Hicks's claims as nonjusticiable. Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHAEL E. HICKS,

Plaintiff,

vs. **CASE NO. 3:99-cv-683-J-25TJC**

RONALD O. HARRISON,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (Dkt. 7), and Plaintiff's response thereto.

Plaintiff is a former member of the Florida Air National Guard (FLANG") and a former federal service technician employed by FLANG, pursuant to 32 U.S.C. § 709 ("National Guard Technicians Act"). The national Guard Technicians Act made Plaintiff's civilian employment contingent on maintaining his membership in FLANG. In 1996, Plaintiff was not selected for retention in FLANG, ad as a result, he was separated from his civilian technician position.

Plaintiff breings this 42 U.S.C. § 1983 equitiable action, challenging the Selective Retention Review Board's decision not to select him for retention in FLANG.[1] Specificaly he

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[1] The Selective Retention Review Board is appointed by the state Adjutant General to consider, under the guidelines of the

claims thqt the Board's decision was based on their anti-union hostility[2] and contends that the Board's actions violated his rights under the First Amendment of the United State[s] Constitution and his statutory right to assist and act for a labor organization, under 5 U.S.C. § 7102.[3]

By this motion, Defendant seeks dismissal of this lawsuit under Federal Rules of Civil Procedure 12(b)(1) and (6), contending that Plaintiff's claims are not justiciable because this action arises out of or in the course of activity incident to military service. For the following reasons the Court finds that the above-styled action should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to state a claim upon which relief may be granted.

Dismissal for failure to tate a claim upon which relief may be granted is appropriate only if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*,

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National Guard Regulation (AF) 35-6, whether to retain FLANG members.

[2] Plaintiff held a position as a union steward in his civilian capacity with the FLANG.

[3] "Although the National Guard has both state and federal characteristics . . . [an] action by the National Guard of a particular state is considered state action . . . and therefore suits alleging constitutional violations of the Guard and its personnel are brought under § 1983, rather than *Bivens* [*v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which authorizes suites against federal officials whose actions violate an individual's constitutional rights.] *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1007 (8th Cir. 1989) (Citations omitted).

355 U.S. 41, 45-46 (1957). In making this determination, the Court is restricted to consideration of facts alleged in the complaint itself. *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). Further, the facts set forth in the compliant must be viewed in the light most favorable to the plaintiff. *Quality Foods De Centro America v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Essentially, Defendant's basis for dismissal is that this action is nonjusticiable.

Plaintiff's position as a National Guard technician is military in nature. *See Nesmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980). And as such the Court's analysis of the justiciability of his claims begins with the doctrine espoused in *Feres v. United States*, 340 U.S. 135 (1950), and reaffirmed most recently by the Supreme Court in *United States v. Stanley*, 483 U.S. 669 (1987).

Feres involved claims brought against the military under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., which waives the federal government's sovereign immunity for actions claiming injuries negligently caused by government employees acting within the scope of their employment, if a private person would be liable under the same circumstances. The Supreme Court in Feres created a judicial exception to this congressionally created waiver. The exception provides that military personnel may no recover damages [under the FTCA) for injuries "aris[ing] out of or are in the course of activity incident to [military] service." Feres, 340 U.S. at 146. The key rationale behind this exception was the Supreme Court's concern that civilian courts would improperly interfere with military discipline and second guess discrete military personnel decisions.

> A test for liability that depends on the extent to which particular suits would call into question military

> discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. . . . Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.

Stanley, 483 at 682-83; *see also United States v. Shearer*, 473 U.S. 52, 57 (1985). In 1983 the holding in *Feres* was extended to all suits for damages where the injuries arise out of or are in the course of activity "incident to service." *Chappell v. Wallace*, 462 U.S. 296, 305 (1983).

The *Feres* "incident to service" standard applies to seciton 1983 claims for damages as well. *See Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1007 (8th Cir. 1989); *Jorden v. National Guard Bureau*, 799 F.2d 99, 106 (3d Cir. 1986); *Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). However, in this case, Plaintifff does not seek monetary relief pursuant to section 1983, but seeks injunctive relief. Thus, the question before this Court is whether Plaintiff's section 1983 claims for equitable relief are also barred by *Feres* and its progeny. The Eleventh Circuit recently answered this question, finding that equitable relief, like monetary relief, is unavailable if the plaintiff's injury was incident to service. *See Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001).

Thus, the only question remaining is whether Plaintiff's injury in this case was "incident to service." The Court must consider the following factors in making this determination:

> (1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of injury.

Pierce v. United States, 813 F.2d 349, 352-53 (11th Cir. 1987) (per curiam); *see also Whitley v. United States*, 170 F.3d 1061, 1070 (11th Cir. 1999). There can be no question that the factors in Pierce have been met in this case. *See Speigner*, 248 F.3d at 1298. Moreover, the Selective Retention Review Board's decision not to retain Plaintiff in military service is the quintessential example of a suit that is nonjusticiable because, in the Supreme Court's view, the Court's inquiry into these matters would interfere with military discipline and second guess discrete military personnel decisions.

Accordingly, it is **ORDERED:**

1. Defendant's Motion to Dismiss (Dkt. 7-1) is **GRANTED**, and the above-styled aciton is **DISMISSED WITH PREJUDICE.**

2. The hearing on this motion, scheduled for June 28, 2001, is **CANCELLED.**

3. The Clerk is **DIRECTED** to enter final judgment in favor of Defendant and against Plaintiff and to close this case.

DONE AND ORDERED in Chambers this 14th day of June, 2001.

/s/
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

Copies to:
Honorable Timothy J. Corrigan
Counsel of Record
Law Clerk
Courtroom Deputy